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DISPATCHED BY **Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 95-221

In the Matter of

TCA Management Co.; Teleservice Corporation of America; and TCA Cable of Amarillo, Inc.

Complainants,

v.

**Southwestern Public Service
Company,**

Respondent

CC Docket No. 95-84

PA 90-0002

HEARING DESIGNATION ORDER

Adopted: June 9, 1995;

Released: June 15, 1995

By the Commission:

I. INTRODUCTION

1. In this Order, we designate for hearing a pole attachment complaint filed by TCA Management Co., and its affiliates, Teleservice Corporation of America and TCA Cable of Amarillo, Inc. (collectively, TCA) against Southwestern Public Service Company (SPS). The complaint concerns the pole attachment rates SPS has charged TCA since October 16, 1990. To expedite the resolution of this complaint, we direct the presiding administrative law judge (ALJ) to require the parties to meet prior to the hearing to determine whether the case can be settled. In the event a settlement is not reached, the presiding judge will, if possible, resolve the case on a paper record, but, if unable to do so, shall conduct such further proceedings as may be necessary.

II. BACKGROUND

A. Statutory and Rule Requirements

2. Pole attachments refer to the placement of cable operator equipment on utility poles owned or controlled by telephone or electric companies. The utility can charge the cable operator for the attachment of its facilities to the utility's poles. Section 224 of the Communications Act of 1934, as amended,¹ empowers this Commission to adjudicate disputes between cable system operators and utilities concerning allegedly unjust and unreasonable pole attachment rates that no state regulates. In enacting Section 224, Congress specified that each pole attachment rate should be deemed just and reasonable if it:

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole....²

This statutory language defines a zone of reasonableness for pole attachment rates that extends from the utility's incremental costs to the cable operator's share of the utility's fully allocated costs. Incremental costs consist of those costs that the utility would not have incurred "but for" cable attachments.³ Fully allocated costs refer to the operating expenses and capital costs of owning and maintaining poles. These costs include depreciation, taxes, administrative expenses, maintenance expenses, and a return on investment.⁴

3. Based on the statutory language contained in Section 224 and the legislative history, the Commission adopted Section 1.1409(c) of its rules.⁵ This section translates the upper bound of the zone of reasonableness defined by Congress into the following formula:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Cost of Poles})$$

¹ 47 U.S.C. §224.

² 47 U.S.C. §224(d)(1).

³ S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977).

⁴ *Id.* at 19-20.

⁵ 47 C.F.R. §1.1409(c).

4. We generally calculate the sum of operating expenses and capital cost of poles by multiplying the net cost of a bare pole times the carrying charges, so that the formula defining the upper bound of the zone of reasonableness becomes:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charges}^6}$$

For electric utilities, the net cost of a bare pole equals 85 percent of the net investment per pole, as in the following formula:

$$\text{Net Cost of a Bare Pole}^7 = \frac{\text{Gross Pole Investment} - \text{Depreciation Reserve (Poles)} - 15\% \text{ Net Pole Investment}}{\text{Number of Poles}}$$

Carrying charges refer to costs incurred by the utility in owning and maintaining poles regardless of the presence of cable attachments. They include the utility's income tax, pole maintenance, administrative, and depreciation expenses, as well as a return on pole-related investment at the authorized intrastate rate of return. We express the carrying charges as a percentage that we calculate using formulas that are set forth in Attachment A.

5. In the Pole Attachment Order, we listed the regulatory accounts to be used, where possible, in applying the formulas to determine the maximum allowable rate for pole attachments. For electric utilities, the accounts are set forth in the Federal Energy Regulatory Commission's (FERC's) Uniform System of Accounts, which is similar to the FCC's Part 32.⁸ Attachment B lists these FERC accounts. For rates charged by large electric utilities, like SPS, the data used in applying the formulas are derived from those the utility reports on FERC Form 1.⁹ Our rules require the electric utility to provide the rate formula data to the cable operator.¹⁰

⁶ See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd 4387, 4388, para. 6 (1987) (Pole Attachment Order), recon., 4 FCC Rcd 468 (1989).

⁷ Id.

⁸ See 18 C.F.R. Part 101.

⁹ Form 1 is the annual report that electric utilities file with FERC. Form 1 contains both financial and operational data.

¹⁰ 47 C.F.R. §1.1404(h).

B. The Pleadings

6. TCA filed its complaint on October 16, 1990. In it, TCA states that it owns and operates cable television systems serving several Texas communities. TCA also states that it has pole attachment contracts with SPS, that it has attached distribution facilities to SPS's poles pursuant to those contracts, and that it pays SPS an annual rental fee of \$4.18 for each pole attachment.¹¹ Using information provided by SPS and applying the Commission's pole attachment formula, TCA calculates that the maximum just and reasonable rate for its pole attachments is \$2.09 per year.¹² TCA urges the Commission to substitute this lower rate for the \$4.18 rate contained in the contracts, and to order refunds with interest of any payments in excess of the \$2.09 rate.¹³ TCA also states that it attempted to negotiate a reduction in the current rate with SPS, but that the differences between the parties do not appear susceptible to settlement.¹⁴

7. In its response to TCA's complaint, SPS makes both procedural and substantive arguments. We address these arguments below.

III. PROCEDURAL MATTERS

A. Sufficiency of Complaint

1. Service

8. Section 1.1404(b) of our rules¹⁵ requires pole attachment complainants to serve copies of the complaint on the state agencies that regulate "any aspect of service provided by the utility."¹⁶ SPS contends that TCA did not serve three of the state commissions that regulate SPS -- the Kansas, Oklahoma, and New Mexico commissions -- with copies of the complaint and that we, therefore, should dismiss the complaint.¹⁷ TCA states that it served a copy of the complaint on the

¹¹ TCA Complaint at 2-3.

¹² Id. at 3 & Exhibit A.

¹³ Id. at 3-4.

¹⁴ Id. at 3.

¹⁵ 47 C.F.R. §1.1404(b).

¹⁶ Id.

¹⁷ SPS Response at 2.

Texas commission and that it did not serve the Kansas, Oklahoma and New Mexico commissions with copies of the complaint because the poles whose rates are at issue are located in Texas.¹⁸

9. We reject SPS's contention that we should dismiss TCA's complaint for non-compliance with Section 1.1404(b). Because the complaint concerns attachment rates for poles located in Texas, the Kansas, Oklahoma, and New Mexico commissions have no more than an indirect interest in this complaint. In these circumstances, TCA's failure to serve those state commissions with copies of the complaint does not require its dismissal.¹⁹

2. Data Included in Complaint

10. Section 1.1404(g) of our rules²⁰ requires pole attachment rate complainants to include certain specified information in their complaints. SPS maintains that TCA has not specified all information and arguments necessary to show that the \$4.18 rate is unjust and unreasonable, and thus, the Commission should dismiss TCA's complaint.²¹ SPS, however, does not identify what information or argument is missing in the complaint. TCA states that its complaint presents all necessary information and that SPS does not elaborate on its argument to the contrary.²²

11. The purpose of the information required by Section 1.1404(g) is to ensure that accurate, up-to-date information is utilized in pole attachment proceedings.²³ We find that TCA's complaint includes all information necessary for us to apply the pole attachment rate formulas. Although SPS disputes some of the numbers TCA uses in applying the formulas to calculate the maximum just and

¹⁸ TCA Reply at 16.

¹⁹ See Warner Amex Cable Communications, Inc. v. Southwestern Electric Power Co., PA 82-0017, Mimeo 2718, slip. op. at 1, n.1. (Com. Car. Bur. released Mar. 12, 1982), rev. denied, FCC 84-655 (released Jan. 7, 1985).

²⁰ 47 C.F.R. §1.1404(g).

²¹ SPS Response at 2.

²² TCA Reply at 16.

²³ See Pole Attachment Order, 2 FCC Rcd at 4398, ¶84.

reasonable rate, the existence of those disputes does not require dismissal of the complaint.²⁴

3. Pole Counts

12. Section 1.1404(g) of our rules²⁵ requires that each pole attachment rate complaint include the total number of poles owned, controlled, or used by the utility as well as the total number of poles that are the subject of the complaint. SPS argues that we should dismiss the complaint because it does not accurately account for all the poles subject to the pole attachment agreements.²⁶ TCA states that it is aware of no dispute regarding the number of poles subject to those agreements. TCA indicates that any such dispute would be immaterial to resolution of its complaint and that exact pole counts will not be necessary until the parties calculate refunds.²⁷

13. Because TCA provided us with the information necessary to apply the pole attachment rate formulas, we find that TCA's failure to specify the exact number of poles subject to complaint does not require the complaint's dismissal. To expedite resolution of that complaint, we require TCA to file data regarding the number of SPS's poles to which it attaches in Texas.²⁸ We defer to the ALJ to resolve any issue that develops in this regard.

4. Validity of Contract

14. SPS also argues for dismissal of the complaint on the ground that its agreements with TCA are products of arm's-length negotiations and, therefore, are not unjust or unreasonable.²⁹ TCA claims that the agreements are adhesion contracts

²⁴ See, e.g., *Capital Cities Cable, Inc. v. Southwestern Public Service Company*, PA 85-0005, Mimeo 5431 (Com. Car. Bur. released June 28, 1985); *Riverside Cable TV, Inc. and Storer Cable Communications of Arkansas, Inc. v. Arkansas Power and Light Company*, PA 85-0001, Mimeo 4813 (Com. Car. Bur. released May 30, 1985).

²⁵ 47 C.F.R. §1.404(g).

²⁶ SPS Response at 2.

²⁷ TCA Reply at 17.

²⁸ 47 C.F.R. §1.1409(a).

²⁹ SPS Response at 2.

and that, in a case involving SPS, the Common Carrier Bureau rejected an argument similar to SPS's present argument.³⁰

15. We reject SPS's argument. In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters.³¹ To remedy the effects of that superior bargaining power, Congress gave this Commission jurisdiction to hear and resolve complaints regarding pole attachment rates.³² The only prerequisites to our exercise of that jurisdiction are that the company providing the pole attachments be a "utility" within Section 224's definition of that term and that no state regulate those attachments.³³ We conclude that the necessary prerequisites have been met, as SPS concedes,³⁴ and hold that SPS's argument does not provide a ground for dismissal.³⁵

B. Request for Evidentiary Hearing

16. SPS argues that in the event we do not dismiss the complaint, that we should designate it for hearing on all contested issues.³⁶ TCA contends that an evidentiary hearing would be inconsistent with the Commission's intent to resolve most pole attachment complaints on the basis of the parties' filings, while reserving evidentiary hearings for "very exceptional cases."³⁷

17. While we agree with TCA that we should resort to evidentiary hearings in pole attachment cases only in exceptional circumstances, our actions in

³⁰ TCA Reply at 17-18 (citing *Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, PA 85-0005, Mimeo 6957 (Com. Car. Bur. released Sept. 13, 1985)) (*Capital Cities v. SPS*), aff'd Mimeo 5431 (Com. Car. Bur. released June 28, 1985)).

³¹ S. Rep. No. 95-580, 95th Cong., 1st Sess. at 13.

³² 47 U.S.C. §224(b)(1).

³³ 47 U.S.C. §224(a), (c). See *Capital Cities v. SPS* supra, slip op. at 2, ¶3.

³⁴ Compare SPS Response at 1 with TCA Complaint at 1-2.

³⁵ *Monongahela Power Co. v.*, FCC, 655 F.2d 1254, 1257 (D.C. Cir. 1981)(per curiam); see *Capital Cities v. SPS* supra, slip. op. at 2, ¶4; *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, PA 84-0016, Mimeo 35810, slip. op. at 2, ¶4 (released May 17, 1985); *TeleCable Development Corp. v. Appalachian Power Co.*, PA 79-0007, Mimeo 889, slip. op. at 3, n.2 (Com. Car. Bur. released Oct. 31, 1980).

³⁶ SPS Response at 12.

³⁷ TCA Reply at 18-19 (quoting *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Notice of Proposed Rulemaking, 68 FCC 2d 3, 7 (1978)).

this Order are consistent with that principle. In adopting our pole attachment rules, we stated that we would treat pole attachment complaints in the simplest and most expeditious manner possible considering the circumstances.³⁸ We recognized that the procedures we would have available would include "paper hearings" before ALJs, as well as traditional evidentiary hearings.³⁹ We stated that we would designate pole attachment complaints for hearings before ALJs only when the issues raised warranted such action and that we would order "paper hearings" in those cases if practicable.⁴⁰

18. This complaint has been pending since October 1990, with no movement toward resolution. In this Order, we end that situation by resolving all procedural issues and those substantive issues that the record allows us to resolve.⁴¹ We believe that the most expeditious procedure for resolving the remaining substantive issues is to designate this case for hearing before an ALJ. In taking this step, we direct the presiding ALJ to use procedures designed to encourage the parties to settle the case or narrow their differences. The ALJ may request either or both parties to provide any additional information deemed appropriate to clarify the issues or facilitate their resolution.⁴² If the parties are unable to settle the case, the ALJ shall attempt to resolve the complaint based on the paper record. If unable to do so, the ALJ shall have discretion to conduct such further proceedings as may be necessary to resolve all remaining issues.

19. We believe that the procedures outlined above are consistent with our intent in promulgating our pole attachment rules and will expedite resolution of the instant complaint. To ensure that other pending and future pole attachment complaints are resolved expeditiously, we delegate to the Chief, Common Carrier Bureau, authority to designate them for hearing before ALJs in appropriate circumstances. The parties shall address any exceptions to the ALJs' decisions in this

³⁸ Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585, 1600 (1978), recon., Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979), recon., 77 FCC 2d 187 (1980), aff'd sub nom. Monongahela Power Co. v. FCC, 655 F.2d. at 1257, vacated in part and remanded sub nom. Alabama Power Co. v FCC, 773 F. 2d 362 (D.C. Cir. 1985), on remand, 2 FCC Rcd 4387 (1987), recon., 4 FCC Rcd 468 (1989).

³⁹ Id.; see also 47 C.F.R. §1.1411.

⁴⁰ Id.

⁴¹ See supra paras. 8-17 & infra paras. 19-27.

⁴² See 47 C.F.R. §1.1409(a).

proceeding or in other pole attachment proceedings that are designated for hearing to the Commission, rather than to the Review Board as is normal practice.⁴³

20. The burden of proof in this proceeding rests with the complainant. We are not shifting that burden from the complainant to the respondent by designating this case for hearing. The Common Carrier Bureau may participate in the proceedings before the ALJ through a separated trial staff. If the Common Carrier Bureau intends to participate in those proceedings, the separated trial staff shall file an appropriate Notice of Appearance with the presiding ALJ.

IV. SUBSTANTIVE MATTERS

A. Space Occupied by Cable

21. In the maximum rate formula used in its complaint, TCA assigned the cable operator one foot of usable space. SPS maintains that TCA should be allocated 42 inches of pole space, rather than one foot.⁴⁴ SPS argues that the National Electric Safety Code requires it to maintain a 40-inch safety space between its and TCA's lines. SPS contends that TCA should be assigned this entire space as well as the two inches that TCA's cable bracket and bolt occupy on each pole.⁴⁵ SPS states that it does not use the safety space, that the only beneficiary of this safety space is TCA, and that TCA does not maintain the safety space.⁴⁶

22. TCA contends that it should be allocated only one foot of usable space per pole. TCA states that the Commission adopted the one-foot allocation as a reasonable interpretation of Congressional intent, and that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has upheld this standard.⁴⁷ TCA claims that the basis for assigning one foot to cable operators remains sound. TCA also asserts that SPS has admitted that it makes profitable use of the space separating communications lines from power lines and that SPS's claim that it does not use this space is thus incorrect.⁴⁸ Further, TCA states that it already pays for the

⁴³ See 47 C.F.R. §0.361(a).

⁴⁴ SPS Response at 3.

⁴⁵ *Id.* at 6-7.

⁴⁶ *Id.* at 5-6.

⁴⁷ TCA Reply at 11(citing *Monongahela Power Co. v. FCC*, 655 F. 2d at 1256)).

⁴⁸ *Id.* at 13-14.

separation space, but in proportion to the amount of usable space it occupies.⁴⁹ Finally, TCA asserts that its agreements with SPS obligate it to construct and maintain the separation space in some circumstances.⁵⁰

23. In the Usable Space Order,⁵¹ we determined, after considering arguments similar to those SPS raises, that we should permanently assign one foot of usable space per pole to cable operations. That determination reflected, among other considerations, the respective responsibilities of utilities and cable operators under pole attachment agreements as well as the legislative history behind Section 224, and is consistent with the D.C. Circuit's affirmance of our prior interim policy of assigning one foot of usable space per pole to cable operations. SPS presents no compelling argument against the application of the one-foot standard in this case. We, therefore, direct the presiding ALJ to assign one foot of usable space per pole to TCA's operations, rather than the 42 inches SPS urges.

B. Operating Expenses

1. Maintenance

24. The formula used by TCA in its complaint for calculating maintenance expense carrying charges divides the utility's balance in FERC Account 593, Maintenance of overhead lines, by its balances in FERC Accounts 364, Poles, towers & fixtures, 365, Overhead conductors, and 369, Services, minus the depreciation reserves and accumulated deferred taxes related to those accounts.⁵² SPS includes FERC expense Accounts 580, Operation supervision and engineering, 583, Overhead line expenses, 588, Miscellaneous distribution expenses, and 590, Maintenance supervision and engineering, in addition to Account 593 in the numerator of the calculation. SPS argues that these additional accounts reflect the actual expenses incurred in maintaining pole attachments and that TCA should be allocated its pro rata share of these expenses.⁵³ TCA states that SPS has submitted no evidence to justify including these additional accounts in the maintenance expense

⁴⁹ Id. at 15.

⁵⁰ Id.

⁵¹ See Petition to Adopt Rules Concerning Usable Space on Utility Poles, Memorandum Opinion and Order, RM 4556, FCC 84-325, at para. 10 (released July 25, 1984)(Usable Space Order).

⁵² TCA Reply at 5.

⁵³ SPS Response at 8-9.

carrying charge calculation and that Commission precedent excludes these accounts from that calculation.⁵⁴

25. We reject SPS's inclusion of these other accounts in the maintenance expense carrying charge calculation. We have previously determined that the only expense account that electric utilities should include in their maintenance expense calculations is Account 593.⁵⁵ The additional accounts SPS seeks to include in those calculations have a minimal relation, if any, to pole attachments and thus, should not be included in maintenance expenses.⁵⁶

26. SPS also reduces Account 369, Services, to exclude underground plant expenses from the maintenance expense denominator.⁵⁷ TCA objects to this exclusion. TCA states that the Commission has recognized a mismatch between pole investment accounts and pole maintenance expense accounts because Account 369 includes aerial as well as underground investment, but concluded that the present formulation is the best available approximation of pole expense.⁵⁸

27. We reject the exclusion of a portion of Account 369 from the maintenance expense denominator, even though that account includes aerial as well as underground investment. We adopted the pole attachment rate formulas, including the maintenance expense formula SPS seeks to adjust, in order to provide a fair, but expeditious methodology for calculating maximum reasonable pole attachment rates. The formulas rely on data electric utilities report for specific accounts on FERC Form 1. The exclusion SPS proposes disaggregates one of those accounts in a way favorable to SPS. If we were to allow that exclusion, we would also, in fairness to TCA, require SPS to disaggregate other accounts to eliminate other mismatches between investments and expenses. We decline to take that step because it would

⁵⁴ Id. at 5-8

⁵⁵ Pole Attachment Order, 2 FCC Rcd at 4402, 4404.

⁵⁶ See, e.g., Warner Amex Cable Communications, Inc. v. Southwestern Electric Power Company, Mimeo No. 2718 (Com. Car. Bur. released March 12, 1982); Trenton Cable TV, Inc. v. Missouri Public Service Co., Mimeo No. 2152, para. 11 (Com. Car. Bur. released February 12, 1982) (rejecting inclusion of FERC Accounts 583, 588, and 590 in maintenance expense calculations); Telprompter Corporation v. Alabama Power Company, Mimeo No. 001808, at para. 14 (Com. Car. Bur. released June 29, 1981).

⁵⁷ SPS Response at 9.

⁵⁸ TCA Reply at 8-9.

unduly complicate the pole attachment rate calculation process without materially increasing its accuracy.⁵⁹

2. Cost of a Bare Pole

28. TCA's complaint did not include right of way costs in its bare pole calculations. SPS, on the other hand, includes right of way costs in its calculation of the net cost of a bare pole.⁶⁰ TCA maintains that SPS submits no evidence concerning the relevance of right of way investment to chargeable pole plant, or the basis for allocating that investment to poles in the cost of a bare pole formula.⁶¹ TCA further argues that even if right of way costs should be included, SPS has accounted for them improperly.⁶² TCA contends that the investment attributable to physical property located in easements is proportional to the use of those easements, rather than to the cost of the property located on those easements. TCA argues that poles make only limited physical use of rights of way and that any right of way charges must reflect that limited use.⁶³

29. Our pole attachment rules recognize that right of way costs may properly be recovered in pole attachment rates.⁶⁴ The parties, however, disagree regarding the percentage of SPS's right of way costs to include in SPS's rates: SPS contends that we should include sixty percent of those costs, while TCA would have us include only two percent. Because the record is insufficient to permit us to resolve this dispute, we refer this issue to the ALJ for resolution in the hearing or settlement process.

V. CONCLUSION

30. Notwithstanding our findings in paragraphs 8-27, above, we believe that further proceedings are necessary to resolve questions of fact bearing on whether SPS charged TCA more than the just and reasonable rates for pole attachments since the complaint was filed in 1990. To expedite this proceeding, we designate this complaint for a hearing before an ALJ pursuant to Section 1.1411 of

⁵⁹ See Warner Amex Cable Communications Inc. v. Arkansas Power and Light, Mimeo No. 100 (Com. Car. Bur. released October 11, 1983).

⁶⁰ SPS Response at 7.

⁶¹ TCA Reply at 3.

⁶² Id.

⁶³ Id. at 4.

⁶⁴ 47 C.F.R. §1.1404(g)(12).

the rules.⁶⁵ In taking this step, we direct the presiding ALJ to use procedures designed to encourage the parties to settle the case or narrow their differences. The ALJ may request one or both of the parties to provide any additional information deemed necessary to clarify the issues or facilitate their resolution. If the parties are unable to settle the case, the ALJ will attempt to decide this case based on the paper record. If unable to do so, the ALJ shall have discretion to conduct such further proceedings as deemed necessary and to add any issues during the hearing that will aid in resolving the complaint.

31. If the parties fail to reach a settlement, the ALJ will determine whether SPS charged TCA pole attachment rates in excess of the maximums allowable under Section 1.1409(c) of the rules.⁶⁶ If the rates are unlawful, the ALJ shall determine the refund amount and any interest that is to be paid pursuant to Section 1.1410 of the rules.⁶⁷ To assist the ALJ in efforts to decide the case based on a paper record, we direct SPS to file with the Commission the data required by Section 1.1404(g) and any other data needed to calculate the maximum rates pursuant to our pole attachment formulas. The data shall be for each of the calendar years 1990 through 1994, be supported by affidavit, and take into consideration the rulings made in this Order. SPS shall serve this data on TCA.

32. We direct TCA to file with the Commission the number of SPS's poles to which TCA's cable fixtures were attached in each of the years 1990 through 1994 and in 1995 through the date of SPS's filing in response to this Order. We also direct TCA to file with the Commission the annual pole attachment rates it has been charged by SPS for the years 1990 through the date of SPS's responsive filing. TCA shall support these data by affidavit and serve them on SPS. The issues to be decided in the hearing are set forth below.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), & 224, that the complaint TCA Management Co., Teleservice Corporation of America, and TCA Cable of Amarillo, Inc. filed October 16, 1990, against Southwestern Public Service Company IS GRANTED to the extent indicated in Parts III and IV of this Order, and to the extent not granted, IS REFERRED to an Administrative Law Judge.

⁶⁵ See 47 C.F.R. §1.1411.

⁶⁶ 47 C.F.R. §1.1409(c).

⁶⁷ 47 C.F.R. §1.1410.

34. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), & 224, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

- 1. To determine whether SPS charged TCA pole attachment rates that exceeded the maximum amounts allowable under Commission rules during the period covered by the complaint.**
- 2. If SPS has charged TCA excessive pole attachment rates during the period covered by the complaint, to determine the amounts of the refunds SPS must pay TCA.**
- 3. To determine, in view of the evidence adduced on the foregoing issues, whether TCA is entitled to interest on any refund amounts and, if so, the amount of that interest.**

35. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence SHALL BE UPON complainants.

36. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 C.F.R. §1.221, within twenty (20) days of the mailing of this Order.⁶⁸

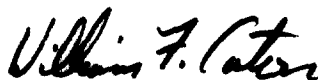
37. IT IS FURTHER ORDERED, that SPS and TCA SHALL FILE the information set forth in paragraphs 31 and 32, above, within thirty (30) days of the mailing of this Order.

38. IT IS FURTHER ORDERED, that the parties SHALL ADDRESS any exceptions to the ALJ's decision in this proceeding to the Commission.

⁶⁸ The separated trial staff will file an appropriate Notice of Appearance before participating in the proceedings before the presiding ALJ.

39. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau, SHALL HAVE DELEGATED AUTHORITY to designate pole attachment complaint cases for hearing before an Administrative Law Judge in appropriate circumstances.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "William F. Caton".

William F. Caton
Acting Secretary

ATTACHMENT A POLE ATTACHMENT FORMULAS FOR ELECTRIC UTILITIES

| | | |
|---|---|---------------------------------|
| Maximum Rate | = | $\frac{A \times C \times D}{B}$ |
| Net Cost of a Bare Pole (C) | = | $\frac{.85 (E - F - G^*)}{I}$ |
| Net Pole Investment (H) | = | $E - F - G^*$ |
| Net Plant Investment (J)** | = | $K - L - M^*$ |
| Accumulated Deferred Income Taxes (Poles) (G) | = | $\frac{E \times M^*}{K}$ |
| Depreciation Carrying Charge (N) | = | $O \times \frac{E}{H}$ |
| Administrative Carrying Charge (P) | = | $\frac{Q}{J^{**}}$ |
| Tax Carrying Charge (R) | = | $\frac{S}{J^{**}}$ |
| Maintenance Carrying Charge (T) | = | $\frac{U}{W}$ |

A = Space Occupied by CATV; 1 foot
 B = Total Usable Space; usually 13.5 feet
 C = Net Cost of a Bare Pole
 D = Carrying charges, (N + P + R + T + V)
 E = Gross Pole Investment in FERC Account 364
 F = Depreciation Reserve (Poles)
 G = Accumulated Deferred Income Taxes (Poles)
 H = Net Pole Investment
 I = Number of Poles
 J = Net Plant Investment**
 K = Total Gross Plant Investment
 L = Total Depreciation Reserve
 M = Total Accumulated Deferred Income Taxes = Sum of Accounts (281, 282, 283, and 190)*
 N = Depreciation Carrying Charge
 O = Depreciation Rate for Poles
 P = Administrative Carrying Charge
 Q = Total General and Administrative Expenses
 R = Tax Carrying Charge
 S = Total Current and Deferred Tax Expense = Sum of Accounts 408.1, 409.1, 410.1 and 411.4) less Account 411.1
 T = Maintenance Carrying Charge
 U = Maintenance of overhead lines (Account 593)
 V = Cost of Capital (Return) = Return Authorized by State Regulatory Commission
 W = Investment in FERC Accounts 364, 365 and 369 less Depr Reserve and Accumulated Deferred Taxes related to those accounts.*

* We treat deferred taxes as most state commissions do -- as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, we would not make any further adjustment.

** For companies with multiple operations, the Commission, in calculating the administrative expense carrying charge, utilizes only investment relating to electric operations. However, for the tax carrying charge, the total plant investment of all the company's operations is utilized because taxes paid by a utility generally relate to its entire operations.

ATTACHMENT B

ACCOUNTS USED IN FORMULAS

| <u>FERC ACCOUNT NO.</u> | <u>ACCOUNT NAME</u> |
|--------------------------------|--|
| 364 | Poles, Towers & Fixtures |
| 365 | Overhead Conductors |
| 369 | Services |
| 593 | Maintenance of Overhead Lines |
| 408.1 | Taxes Other Than Income Taxes |
| 409.1 | Income Taxes-Federal |
| 409.1 | Income Taxes-Other |
| 410.1 | Deferred Income Taxes |
| 411.1 | Deferred Income Taxes (Credit) |
| 411.4 | Investment Tax Credit Adjustment |
| NA | Depreciation |
| NA | Total Administrative and General Expenses |
| NA | Gross Plant Investment |
| NA | Depreciation Rate for Accounts 364, 365 & 369 |
| NA | Investment in Accounts 364, 365 & 369 |